6-2200-8062-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Proposed
Revisions of the Rules Governing
the Classification and Standards
for Waters of the State,
Minnesota Rules Chapter 7050

REPORT OF THE
ADMINISTRATIVE LAW
JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein according to the following schedule:

Wednesday, August 25, 1993	St. Paul
Monday, August 30	Marshall
Tuesday, August 31	Detroit Lakes
Wednesday, September 1	Brainerd
Thursday, September 2	Duluth
Tuesday, September 7	Fairmont
Wednesday, September 8	Rochester
Thursday, September 9	St. Paul

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. 14.131 through 14.20 to determine whether the Agency has fulfilled all relevant substantive and procedural requirements, whether the proposed rules are needed and reasonable, and whether or not the rules, as modified, are substantially changed from those originally proposed.

A number of Agency personnel appeared at various times during the proceeding. The "core group" representing the staff included Assistant Attorney General Richard Cool, Duane Anderson, Gerald Blaha, Greg Gross, David Maschwitz, and Debbie Olson.

The Agency must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Agency of actions which will correct the defects and the Agency may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or

reasonableness, the Agency may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Agency does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Agency elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Agency may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Agency makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Agency files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On July 16, 1993, the Agency filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules certified by the Revisor of Statutes.
(b) The Order for Hearing.
(c) The Notice of Hearing proposed to be issued.
(d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
(e) The Statement of Need and Reasonableness.
(f) A Statement of Additional Notice.

2. On July 19, 1993, a Notice of Hearing and a copy of the proposed rules were published at 18 State Register page 143.

3. On July 22, 1993, the Agency mailed the Notice of Hearing to all persons and associations who had registered their names with the Agency for the purpose of receiving such notice.

4. On July 30, 1993, the Agency filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.

(c) The Affidavit of Mailing the Notice to all persons on the Agency's list.

(d) An Affidavit of Additional Notice. In addition to the Agency's list, the Agency mailed copies of the Notice to approximately 866 city mayors, 1800 township chairpersons, 525 county commissioners, and over 100 other water-related boards and districts.

(e)The names of Agency personnel who would represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.

(f) A copy of the State Register containing the proposed rules.

(g) All materials received following two Notices of Intent to Solicit Outside Opinion published at 16 State Register 1958, dated February 24, 1992 and 17 State Register 449, dated August 31, 1992.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comment and statements remained open until September 29, 1993. Then, a response period continued to October 6. On October 6, the record closed for all purposes.

Background and Nature of the Proposed Amendments

6. Water quality standards were first adopted by the State of Minnesota in 1967, and have been revised periodically since then. The most recent revisions occurred in 1990.

7. Minnesota Rules Chapter 7050 essentially consists of two parts. One part classifies all waters of the State into different classifications depending on their uses. The other major part sets forth water quality criteria and standards for each class.

8. The Federal Clean Water Act, as amended, 33 U.S.C. 1251, et seq., contains numerous provisions which affect the State's rules. Primary among these is the provision contained in section 303(c)(1) which requires each state to hold public hearings and review and revise their water quality standards at least once every three years. Section 303(c)(1) of the Act gives the Federal Environmental Protection Agency final approval of the proposed rules and, ultimately, the power to promulgate rules for the State if the EPA finds that the State has failed to follow the requirements of the Clean Water Act.

9. In this proceeding, the Agency is proposing a number of changes to its existing rules. It is proposing both changes in the classification of certain waters and changes to the standards that affect the various classes of waters. The major issues which arose during this proceeding included the following:

(a) wetland regulation and the role of the Agency in light of other government regulators;

(b) a change in the method of monitoring run-off from agricultural feedlots;

(c) the appropriate classification for Center Creek, downstream of Fairmont, Minnesota;

(d) the appropriate classification of the Fraser Mine Pit near Chisholm, Minnesota;

(e) the appropriate classification of Hay Creek, at Red Wing, Minnesota;

(f) effluent standards for iron and manganese, particularly where background levels exceed the proposed standard.

Statutory Authority

10. Minn. Stat. 115.03, subd. 1(b) directs the Agency to investigate water pollution and "make such classification of the waters of the State as it may deem advisable." Subdivision 1(c) then directs the Agency to "establish and alter such reasonable pollution standards for any waters of the State in relation to the public use to which they are or may be put as it shall deem necessary . . . ."

11. In addition to the authority found in section 115.03, there is also authority found in section 115.44. That statute, in subdivision 2, directs the Agency to group waters of the State into classes, and adopt classifications and standards of purity and quality. Subdivision 3 sets forth a number of factors which the Agency must consider in adopting the classifications and standards. Subdivision 4, which was amended in 1993, specifies that the Agency must adopt standards of quality and purity for each classification as "necessary for the public use or benefit contemplated by the classification."

12. Minnesota Aquafarms, Inc. raised a number of objections to the rules because one of the reclassifications would affect the Fraser Mine Pit Lake. Minnesota Aquafarms, Inc. purchased portions of the Fraser Pit (and four other pits) with the intent to use them for fish farming. The City is now using the pit as its primary source of drinking water, and desires to have the water reclassified as a source of domestic consumption water. Minnesota Aquafarms opposes that reclassification out of fear that it will preclude fish farming operations.1

13. Minnesota Aquafarms claims that the proposed reclassification must be preceded by a contested case hearing, not a rulemaking proceeding. Its primary argument is that the effect of the reclassification would substantially harm its property rights and that to do so without a contested case hearing deprives it of due process of law. Aquafarms reasons that rulemaking is designed for agency statements of general applicability, while contested cases are designed to determine the legal rights, duties, or privileges of specific parties.

Reasoning that classifying Fraser Mine Pit

1The dispute between Aquafarms and the City involves a number of legal issues which have nothing to do with this rulemaking proceeding. The Administrative Law Judge has avoided describing them in the foregoing paragraph except to give only the barest essentials, for fear that his characterization may suggest some legal conclusions that the Administrative Law Judge did not intend to make. The Administrative Law Judge does not intend to make any assertions about the property rights, equitable rights, or other disputes which do exist between Aquafarms and the City except as needed. Those must be resolved in other forums.waters for drinking water use results in defining the legal rights between the City of Chisholm and Aquafarms, Aquafarms argues that the classification must be preceded by a contested case proceeding, and not a rulemaking proceeding.

14. The procedure to be followed in classifying waters is prescribed in Minn. Stat. 115.44 (1992, as amended by Laws of Minn. 1993, Chapter 180). To the extent that Aquafarms is suggesting that the Administrative Law Judge find the statute to be facially unconstitutional, that is beyond his authority. However, to the extent that Aquafarms is asking the Administrative Law Judge to declare that the Agency has misread the statute, and wrongly used a rulemaking procedure when the statute intended a contested case procedure, then the Administrative Law Judge does have jurisdiction to deal with that question under the rubric of determining whether the Agency is acting within its statutory authority to adopt the proposed rule. It is concluded that the Agency is not misreading the statute. Both the statute as it existed in 1992, and the statute as it exists following the 1993 amendment, contemplate that rulemaking will be used to classify waters. This is apparent from the wording of the statute. For example, subdivision 2 reads as follows:

> In order to attain the objectives of Laws 1963, ch. 874, the agency after proper study, and after conducting public hearing upon due notice, shall, as soon as practical, group the designated waters of the State into classes, and adopt classifications and standards of purity and quality therefor.

Subdivision 7, prior to the 1993 Session, provided in pertinent part, as follows:

> Notices of public hearing for the consideration, adoption, modification, alteration or amendment of the classification of waters and standards . . . shall specify the time, date and place of hearing, and the waters concerning which classification is sought to be made or for which standards are sought to be adopted or modified.

> Copies of the notice shall:
>
> (a) be published at least twice in a newspaper regularly published or circulated in the county or counties bordering or through which the waters sought to be classified, or for which standards are sought to be adopted flow . . . .

The 1993 amendment changed subdivision 7 by deleting the lead paragraph and subparagraph (a), leaving only a requirement that:

> For rules authorized under this section, the notice is required to be mailed under sections 14.14, subdivision 1a, and 14.22 must also be mailed to the governing body of each municipality bordering or through which the waters, for which standards are sought to be adopted, flow.

15. Although the Administrative Law Judge does not find section 115.44, read as a whole, to be ambiguous with regard to whether or not classifications are to be made by rule or by contested case, in the event that it was deemed to be ambiguous, it would then be appropriate to resort to other aids in construing it. One of those aids is past legislative and administrative interpretations of the statute. See, Minn. Stat. 645.16. In this case, the Agency has a longstanding interpretation that the statute intended rulemaking, not contested cases. For example, in 1980, the Agency initially proposed the classification of limited resource value waters and recommended 187 specific waters for inclusion in that class. Various outside commentators proposed that others be included, while other commentators proposed that some of the 187 be excluded. All of those proposals for individual waters were dealt with during a rulemaking proceeding. In addition, portions of the Minnesota and Mississippi Rivers were proposed to be upgraded from Class 2C to Class 2B. Although that proposal was fiercely contested, the issue was dealt with at length in the rulemaking proceeding. See, generally, 4 State Register 2006, et seq.

In 1984, both the Agency and interested persons proposed a variety of reclassifications for specific bodies of water. These were dealt with in a rulemaking proceeding. See, 8 State Register 2066, et seq.

In 1987, the Agency proposed to add 48 lakes, 28 fens and four scientific and natural areas to the list of outstanding resource value waters. Following the hearing, the staff withdrew its proposal with regard to 13 of the lakes. The question of which lakes were included, and which were withdrawn, was the focal point of that rulemaking proceeding. See, 12 State Register 11, et seq.

Finally, in 1990, a number of fens and streams were reclassified, and a number of trout lakes were added to a class, all in a rulemaking proceeding. See, 14 State Register, pp. 1662-1717.

The record does not include any references to the Agency ever

using a contested case process to classify or reclassify a waterbody.

In summary, there has been a longstanding Agency interpretation favoring classification by rulemaking. This has not been modified by the Legislature, which further supports the statutory interpretation reached above. Therefore, it is concluded that the Agency does have statutory authority to use the rulemaking provisions of Chapter 14 to group waters of the State into classifications, and add, delete, or modify the classifications attached to specific waters.

Fiscal Note

16. Minn. Stat. 14.11, subd. 1 (1992) requires a fiscal note in the notice of hearing if the adoption of the rule will require local public bodies to spend more than $100,000 in either of two years immediately following adoption of the rule. The Agency reviewed the cost of compliance with the various rule provisions and determined that municipalities would not incur more than $100,000 in costs in either of the next two years. The Agency did insert a paragraph in its notice of hearing indicating that it believed that "no municipality will incur costs that exceed $100,000". It should be noted that the statutory test is whether or not the "total cost to all local public bodies in the state" will exceed $100,000. This is an important distinction, which could cause problems in other cases. In this case, however, the Agency has concluded that the $100,000 cap will not be exceed under either test. See, SONAR, pp. 126-27.

17. The only serious challenge to the Agency's conclusion came from the city of Fairmont, which pointed out that the SONAR contained no cost estimates for the continued classification of Center Creek as a Class 2B water. The city has estimated a cost of between $10 to $12 million to upgrade the city's existing waste water treatment plant to meet certain ammonia discharge limitations applicable to 2B waters. The City has asked the Agency to reclassify Center Creek to a Class 7 water, in order to avoid the cost. The Agency does not agree with the City. See, Post-Hearing Brief and Comments of City of Fairmont Regarding Classification of Center Creek, at p. 7.

18. The Agency responds that it is not proposing any change to the classification of Center Creek, and the statute does not require an agency to estimate costs of possible rule changes that are proposed by others.

19. The Administrative Law Judge agrees with the Agency that it need not comply with the fiscal note provision when the costs are not the result of the Agency's proposals. It has long been held (and is now codified in Minn. Rule pt. 1400.0500) that a rule, or portion of a rule, which is not proposed for change by an agency need not be demonstrated to be needed or reasonable. Similar logic would dictate that where the agency is not proposing a change, it need not calculate the fiscal impact of changes proposed by others in determining whether the $100,000

limit has been exceeded.

20. The Administrative Law Judge concludes that the Agency has complied with the fiscal note provisions of Minn. Stat. 14.11, subd. 1 (1992).

Impacts on Agricultural Land

21. On June 24, 1993, the Agency formally submitted a statement to the Commissioner of Agriculture regarding the proposed rule changes and the effect of the rule changes on farming operations. This statement was submitted in connection with Minn. Stat. 116.07, subd. 4 (1992), which requires that the Agency provide a copy of proposed rule changes and a statement of the effect of the rule change on farming operations to the Commissioner of Agriculture before it adopts or repeals rules that "affect farming operations". In this statement (Agency Ex. 7), the Agency identified changes to rules relating to wetlands, alachlor and atrazine, and feedlots. The Department did not register any objection to any of the proposed rules, although the record does contain correspondence back and forth between the Agency and the Department prior to the June 24 submission. See, for example, SONAR, Exhibits G2i and G2j.

22. In addition to the requirement noted above, Minn. Stat. 14.11, subd. 2 provides as follows:

> If the agency proposing the adoption of the rule determines that the rule may have a direct and substantial adverse impact on agricultural land in the state, the agency shall comply with the requirements of sections 17.80 to 17.84.

Minn. Stat. 17.83 provides as follows:

> An agency proposing to adopt a rule which it determines may have a direct and substantial effect on agricultural land shall include notice of the effect in the notice of rule hearing . . . and shall inform the commissioner [of agriculture] in writing. In its statement of need and reasonableness . . . , the agency shall describe the possible adverse effect on agricultural land, state what alternatives the agency considered in order to avoid or reduce the effect, and indicate why the agency elected to proceed with the proposed adoption of the rule. The administrative law judge, in the report . . . shall include recommendations regarding actions available to the agency, including necessary amendments to the proposed rule, in order to avoid adverse effects on agricultural land as a result of implementation or enforcement of the rule.

23. Minn. Stat. 17.81, subd. 2 limits the operation of the above-quoted statute by defining "action which adversely affects" as follows:

> . . . any of the following actions taken in respect to

> agricultural land which have or would have the effect of substantially restricting the agricultural use of the land: (1) acquisition for a nonagricultural use . . . ; (2) granting of a permit, license, franchise or other official authorization for nonagricultural use; (3) lease of state-owned land for nonagricultural use . . . ; or (4) granting or loaning of state funds for purposes which are not consistent with agricultural use.

24. In its Notice of Hearing, the Agency indicated that its proposed amendments would not involve any adverse actions affecting agricultural lands and will not have an adverse impact upon them. In its SONAR, the Agency indicated that it considered the impact of the proposed narrative standards for wetlands, and numerical water quality standards for atrazine and alachlor, but determined that neither of them would substantially restrict the agricultural use of land, nor would they take agricultural land out of production, and thus none of the Agency's proposed rules would have an adverse impact on agricultural lands.

25. The Agency's position was challenged by Aquafarms, which argued that the lands surrounding the Fraser Mine Pit were zoned as agricultural to accommodate Aquafarms' operation, that the proposed rule may prohibit aquaculture in the pit, and therefore, the proposed rule does have a substantial adverse effect on the agricultural use of the land and water. Tr. 9, pp. 105 and 115, as clarified by Aquafarms' Final Comments at p. 13.

26. The Agency responds that it did not overlook Aquafarms' interest in this matter when considering the agricultural impact, but that the Agency determined that its proposed reclassification does not automatically prohibit Aquafarms' use of Fraser Lake for aquaculture and that a reclassification does not trigger any provisions of section 17.83 because it is not "action which adversely affects" agricultural land. The Agency reasons that because the reclassification does not constitute one of the four listed types of impacts (acquisition, permitting, leasing, or funding), the statute is not triggered. Finally, the Agency points out that Aquafarms is currently prohibited from using the Fraser pit for aquaculture activities (Exhibit C56, part I.C.5. at p. 8 and Post-Hearing Response, Attachment 43 at p. 26.) The Agency argues that whether MAI will ever be able to use Fraser Mine Pit Lake for aquaculture purposes is uncertain, and subject to a variety of regulatory proceedings (principally MPCA permitting) which are not even scheduled to begin until 1996.

27. The Administrative Law Judge concludes that the proposed reclassification does not trigger the requirements of Minn. Stat. 17.83 because the Agency has correctly determined that the reclassification does not have a direct and substantial adverse effect on agricultural land. The definition of "action which adversely affects" in Minn. Stat. 17.81, subd. 2 contains four types of actions. The only one which is even close to the reclassification is the one relating to "granting of a permit, license, franchise or other official authorization for nonagricultural use." Reclassification does not constitute such an action. It does not "grant" anything, nor give "permission"

to any person to do anything. Moreover, whether the reclassification will prohibit aquaculture is unknown at this point, and cannot be known until the MPCA permit is finalized some years from now.

Small Business Considerations

28. Minn. Stat. 14.115 imposes two general requirements on an agency. The first is that it consider and adopt certain methods for reducing the impact of proposed rules on small businesses, while the other requires an agency to make additional outreach efforts to notify small businesses of the proposed rules.

29. With regard to outreach, the Agency has satisfied the statutory requirements by including a discussion of small business considerations in the Notice of Hearing and the SONAR. In addition, the Agency published a brief notice of the hearings, with a reference to the full text State Register publication, in "Minneapolis/St. Paul City Business", Agency Ex. 11. The Agency published a similar notice in "Small Business Notes", Agency Ex. 12. The Agency also contacted a variety of state and federal governmental agencies associated with small businesses. See, Agency Staff Post-Hearing Response to Public Comments, at p. 85 and Attachment 62 thereto.

30. With regard to considering and adopting particular methods for reducing the impact of the rule on small businesses, the Agency discussed, in the SONAR, its consideration of the statutory standard.

31. Aquafarms challenged the Agency's compliance with the requirement for considering and including methods to alleviate the impact on small businesses. Aquafarms meets the statutory definition of a small business in Minn. Stat. 14.115, subd. 1. It alleged that the Agency's discussion in the SONAR was too general and failed to discuss Aquafarms' particular situation. Minnesota Aquafarms Comments in Opposition to Fraser Mine Pit Water Classification, at pp. 30-33.

32. The Agency responds that the law does not require it to do more than it did, given the speculative nature of Aquafarms' possible future use of the Fraser Mine Pit Lake. The Agency went into great historical detail concerning Aquafarms' past use and the current prohibition against Aquafarms' use of the lake for aquaculture. The Agency concluded that there were no identifiable economic impacts from the proposed reclassification which could be dealt with at this time. The Administrative Law Judge agrees with the Agency that it is impossible to predict the outcome of the disputes between the City of Chisholm and Aquafarms. It is impossible to predict the outcome of the 1996 permitting process, should Aquafarms seek to reintroduce fish to the Fraser site. It would be unreasonable to require the Agency to speculate about the impacts of its proposed reclassification on some future activity that Aquafarms might desire to engage in. It is concluded that the Agency has adequately complied with the small business considerations by its generalized discussion in

the SONAR.

Scope of this Report

33. The State Register publication of these rules occupied 100 pages. There are a substantial number of rules proposed for revision. This Report is generally limited to a discussion of those rules which received critical comment or otherwise need to be examined. Because many sections of the proposed rules drew no criticism, and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the Agency has demonstrated the need for and reasonableness of each of the proposed rules not discussed in this Report by an affirmative presentation of facts, that the provisions are specifically authorized by statute, and that there are no other problems that prevent their adoption.

34. Before the hearings began, the Agency identified a number of changes which it desired to make to the rules as initially published in the State Register. These changes were introduced into the record at the August 25, 1993 St. Paul hearing, and summarized in Agency Ex. 13. Copies of this exhibit were made available at the registration table at subsequent hearings, and sent to persons who had attended the August 25 hearing, those who had purchased a SONAR, as well as to those who were on the interested parties' mailing list for this rulemaking proceeding. A total of 359 people were sent a copy of the exhibit. Subsequent to the hearings, the Agency proposed a second set of changes to the rules as published. These were attached to the Agency's Post-Hearing Responses as Attachment 2. Then, in its Final Comments, the Agency proposed a few additional changes to the proposed rules. Final Comments, at pp. 122-27.

35. Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed. Minn. Stat. 14.15, subd. 4. The standards to determine if the new language is substantially different are found in Minn. Rules pt. 1400.1100. The Administrative Law Judge has concluded that none of the changes proposed by the Agency throughout the proceeding constitute substantial changes.

36. The Administrative Law Judge must determine, inter alia, whether the need for and reasonableness of the proposed rules has been established by the Agency by an affirmative presentation of fact. The question of whether a rule is reasonable focuses on whether it has a rational basis. A rule is reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn. App. 1985); Blocher Outdoor Advertising Co. v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn. App. 1984). The Agency's burden has been described as a requirement that it "explain on what evidence it is relying and how the evidence connects rationally with the

Agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). An agency is entitled to make choices between possible standards, so long as the choice it makes is rational. When commentators suggest approaches other than that suggested by the Agency, it is not the proper role of the Administrative Law Judge to determine which alternative presents the "best" approach. Instead, his role is to determine whether or not the Agency has demonstrated its approach to be a reasonable one.

Section-By-Section Analysis

Wetlands

37. The Pollution Control Agency has been involved in wetland regulation since 1978, exercising the authority granted to it by section 401 of the Clean Water Act. Exhibit W59 contains 33 examples of Agency actions on specific proposals relating to wetland activities. However, very few people have been aware of the Agency's authority and past activities because these activities are normally conducted between the Pollution Control Agency and the U.S. Army Corps of Engineers. In the relatively few cases where a Corps permit is needed, a project applicant submits an application to the Corps of Engineers. The Corps then contacts the Agency, and asks it to review the proposed project. The Agency then responds to the Corps, setting forth its action with regard to the application. Traditionally, copies of the Agency's decision letters are sent to the Corps, the DNR, the U.S. Fish & Wildlife Service, and the U.S. EPA in Chicago. Copies of the Agency's letters are not routinely sent to the project proposer. Several members of the public and representatives of businesses objected to the Agency's involving itself in wetland activities which, they felt, were already being adequately taken care of by others. They were not aware that the Agency has been involved for many years.

38. The Agency's role in wetland regulation has historically been limited to a relatively small number of projects. These are projects that require any one of the following actions:

1. issuance of a NPDES permit;

2. issuance of a SDS permit; or

3. issuance of section 404 Corps of Engineers permit.

Tr. 2, p. 15.

39. Many commentators objected to duplicative regulation by many agencies. As one commentator put it:

> We see this as similar to a deer being run over by a semi. Three semis track over the top of it and now PCA is proposing to pull up and step out of their vehicle and shoot it for good measure.
>
> There is so much regulation in this area right now, it

> just seems to be an unnecessary and costly expenditure of public funds to add this section of regulation to PCA as well.

Tr. 1, p. 50. A number of commentators pointed to the recent adoption, by the Board of Water and Soil Resources, of an extensive set of rules under the State's Wetland Conservation Act. The general theme sounded by these commentators was that there is plenty of regulation already, and it is not necessary that there be any more.

40. Actually, the relationship between the BOWSR rules and the proposed MPCA rules is more like a deer standing in the middle of a busy highway with two trucks coming toward it from opposite directions. If the deer runs to the left, it gets hit by one semi. But if it runs to the right, it gets hit by the other. It won't get hit by both, at least not on the same issue. Sequencing (avoid-minimize-mitigate) is the prime example. If a section 404 permit, an NPDES permit, or an SDS permit is required for a project, then the project must comply with the PCA rules, including sequencing. But it is exempt from the BOWSR rules on sequencing. On the other hand, if a project doesn't require one of those three permits, it does not have to meet the MPCA rules on sequencing, but it does have to meet the BOWSR rules. While the two sequencing rules are not verbatim duplicates, the concepts underlying them are the same. Both are consistent with Executive Order 91-3, issued by Governor Carlson on January 17, 1991, which directs all state agencies to operate under a "no net loss" policy, to the fullest extent of their authority, and to be guided by the concepts of avoidance, minimization, and mitigation. Thus, there should be no conflict where an individual or business is caught between the two agencies.2

41. In addition to trying to minimize conflict and duplication, the Agency responds that it has no choice with regard to whether or not it regulates wetlands, and that in many instances, even the particular words which it uses in its proposed rules are not of its own choosing -- they are imposed on it by the Federal Environmental Protection Agency. A review of the record indicates that the Agency is correct.

42. The United States Environmental Protection Agency has issued the following "guidance":

2The Agency should be alert for any instances where the day-to-day application of the rules places applicants or others in a "Catch 22" situation where they are caught in conflicts between the BOWSR rules and the PCA rules. The Agency has a history of regular project coordination meetings with the Corps, the BOWSR staff, and the DNR staff to avoid conflicting recommendations on wetland issues. It is hoped that these will continue, so that the fears of the public commentators will not be realized.

> By September 30, 1993, states and qualified Indian tribes must adopt narrative water quality standards that apply

> directly to wetlands. Those standards shall be established in accordance with either the National Guidance, Water Quality Standards for Wetlands . . . or some other scientifically valid method. In adopting water quality standards for wetlands, states and qualified Indian tribes, at a minimum shall:
>
> (1) define wetlands as "state waters";
>
> (2) designate uses that protect the structure and function of wetlands;
>
> (3) adopt aesthetic narrative criteria . . . and appropriate numeric criteria in the standards to protect the designated uses;
>
> (4) adopt narrative biological criteria in the standards; and,
>
> (5) extend the antidegradation policy and implementation methods to wetlands.

United States Environmental Protection Agency. Agency Operating Guidance, FY 1991: Office of Water. Office of the Administrator, Washington, D.C., as cited in Exhibit W3.

43. In August of 1992, the Agency solicited public comment on a draft set of rules. That draft used the Minnesota Wetland Conservation Act as the basis for several important definitions and concepts. For example, it defined "wetlands" by simply referring to the definition in the Wetland Conservation Act. It defined "agricultural lands" with reference to the rules to be adopted under that Act. The Agency proposed rules which contained specific exemptions for certain agricultural activities. Exhibit G7.

44. The Agency received a comment from the U.S. Fish & Wildlife Service indicating that the proposed definition and exemptions were inconsistent with EPA's National Guidance, and the service "strongly supports" EPA's recommendation that states remove or modify regulatory language that limits the authority of water quality standards over wetlands. A copy of the service's letter was sent to the EPA. Exhibit W16.

45. On November 12, 1992, the regional office of the United States Environmental Protection Agency commented on the July 28, 1992 draft of the rules. With regard to the definition of "wetlands", which adopted the same language as the Wetland Conservation Act, the EPA indicated that "the only acceptable definition" is the one set forth in EPA rules. The EPA stated: "The State standards must use this definition." Exhibit W17. In addition, the EPA objected to some of the exemptions proposed by the Agency, and required that a whole subpart be removed from the proposed standards. The subpart attempted to exempt certain projects if they were exempted from the Wetlands Conservation Act.

46. On November 24, 1992, the Agency responded to the EPA's

comments, indicating that it would use the required phraseology for the definition of "wetlands". The Agency disagreed, however, with some of the other comments from the EPA, and urged the EPA to withdraw its concerns. The Agency went on to indicate that it was aware of the conflict between the Federal Clean Water Act and the State's Wetland Conservation Act regarding exemptions, and was "actively searching for some common ground to accommodate both perspectives." Exhibit W18.

47. There is very little difference between the definition of "wetland" in the Agency's proposed rules and the definition in the Wetland Conservation Act. Moreover, the Agency intends to rely upon employees of the Board of Water and Soil Resources or the Department of Natural Resources if there is a question regarding a wetland delineation. Final Comments, p. 8. Therefore, as a practical matter, it is highly likely that the definition, at least, will be administered in a manner consistent with the Wetland Conservation Act. The main difference between the two will be in the absence of all of the exemptions which are contained in the Wetland Conservation Act and its rules. However, since the Agency does not get involved in wetland projects which do not require one of the three kinds of permits enumerated above, the vast majority of the projects which are exempted from the Wetland Conservation Act will be beyond the reach of these rules as well. As noted above, the Agency attempted to include some of the more important of the Wetland Conservation Act's exemptions in the rule, but the EPA would not allow it.

48. The Administrative Law Judge concludes that the Agency has demonstrated the need for and reasonableness of its adopting rules on wetlands despite the perceived overlap with other agencies.

49. The Agency has proposed to establish specific water quality standards for wetlands, labeled as Class 2D Waters. As part of those standards, the Agency has stated that "normal farm practices" of planting or pasturing, "including the recommended applications of fertilizer and pesticides", are excluded from the standards. This is partially consistent with a similar exemption from the Clean Water Act section 404 permitting requirements for "normal farming" activities. See, generally, Exhibit W47. The Minnesota Farm Bureau Federation requested that this paragraph be added to the State rules after the EPA rejected the Wetland Conservation Act exemptions. Exhibit W51. The Agency did add it in response to the comment, but then received comments from power companies, Mn/DOT, the Minnesota Forest Industry, Timber Producers Association, and similar entities who routinely apply herbicides and pesticides but who cannot qualify for the "normal farming" exemption. They asked that they be treated in a similar manner. The Agency responded that it could not expand the scope of the proposed language to include them (presumably because it would then be substantially broader than the Clean Water Act exemption, and thus be vetoed by the EPA), but indicated that the Agency would exercise its prosecutorial discretion to refrain from taking enforcement activities in connection with applications of herbicides and pesticides so long as label

requirements are followed and so long as there are no CWA 402, 401 or SDS permits or certifications required. Post-Hearing Comments at p. 8 and Final Comments at p. 9. The Agency recognizes that the applications of herbicides and pesticides are already regulated by the EPA, with oversight by the Minnesota Department of Agriculture and the Minnesota Department of Natural Resources, which regulation includes "recommended applications" standards.

50. The exemption for "normal farm practices" was opposed by the U.S. Fish & Wildlife Service as diluting wetland protection by excluding an activity that has been shown to affect a high percentage of Minnesota's wetlands. The Service presented data from nine rural counties which showed that the proposed exemption would allow "unrestrained agricultural chemical inputs" to between 86% and 47% of the wetlands in those counties. The Service noted that "typical agriculture use" of herbicide in the west central agricultural area of the State could potentially impact the water quality of prairie potholes. Concentrations already detected have in as high as 30 ug/l (Dual), 54 ug/l (Basagdan), 6.56 ug/l (Alachlor), and 28 ug/l (Atrazine). The Service noted that such concentrations had been determined to impact algae, floating plants, and some shallow-rooted broadleaved submergents. The Service believed that inclusion of the proposed exemption would allow agricultural chemicals to potentially cause a significant risk to aquatic life and wildlife. Other commentators (National Audubon Society, Sierra Club, and Isaac Walton League) all argued that the agricultural exemption was either unnecessary or unreasonable.

The Fish & Wildlife Service's assertion that the exemption would allow "unrestrained agricultural chemical inputs" seems to ignore the limitation contained within the exemption which allows only "recommended applications". As noted earlier in the discussion of those who wish to broaden this exemption, the Agency has placed faith in the limitations contained in the labeling requirements. The appropriate question which the Service should address, and which the Agency might well wish to address in the next triennual review, is whether or not the labeling requirements are adequate limitations. If they are not, then the Agency may wish to add its own limitations (as it has proposed to do for Alachlor and Atrazine in this proceeding) and then make the farming exemption subject to those limitations, rather than the labeling limitations. In other words, the labeling limitations would be a "default" standard for the many substances which the Agency has not adopted specific standards, but where the Agency has adopted specific standards, then those specific standards would apply. But for purposes of this proceeding, the Agency is entitled to rely on the labeling limitations. The exemption does not exempt agriculture from all of Chapter 7050. It only exempts it from the 2D standards (which also include the 2B standards). For example, it does not exempt agriculture from existing rule 7050.0210(2), which prohibits the discharge of wastes so as to cause a nuisance condition, "such as . . . aquatic habitat degradation . . . or other offensive or harmful effects". Therefore, the Agency and the public (including the Fish & Wildlife Service and the environmental groups) are not without recourse in the event that an

application, even within the labeling restrictions, causes serious harm. But except for such an unusual circumstance, the Agency is essentially telling farmers that if they follow the label restrictions, they are exempt from the class 2B and class 2D standards for normal farming practices.

51. The Administrative Law Judge concludes that the resolution of this issue (the reasonableness of the "normal farm practices" exemption) depends upon determining what are harmful levels of various herbicides and pesticides. For example, in this proceeding, the Agency has identified specific levels of alachlor and atrazine and developed water quality standards for them. One of the stated justifications for doing so was because of the greater emphasis being placed on the control of nonpoint source pollution, including agricultural runoff. SONAR, pp. 14 and 63. However, it would appear that for most fertilizers and pesticides, the Agency is deferring to the protections resulting from the "recommended applications", which are established by other agencies, including the EPA and the Department of Agriculture. This represents a legitimate policy decision which the Agency may make.

Aquatic Life Standards: Iron and Manganese

52. The Agency proposed to add eight new water quality standards to the rules. These included iron and manganese. The Agency was aware that there were areas of the State where the natural background concentration of both of these exceeded the proposed standards. Nevertheless, the Agency believed it would be more efficient to have a single statewide standard, and then grant variances or otherwise deal with the situations where the background exceeded that standard, rather than to do case-by-case, site-specific criteria. As a part of the hearing process, the Agency changed its mind about the efficiency it hoped to achieve. A number of commentators noted that the ground water aquifers underlying the Twin Cities area, including the Jordan aquifer, had natural concentrations exceeding the proposed standards. Therefore, anybody proposing to discharge this ground water to a surface water, as in situations of ground water remediation activities, would either have to install removal equipment, apply for a variance, or negotiate with the staff about the appropriate limit. In addition, questions were raised regarding the fact that the iron standard was expressed in terms of total iron, while there are situations where a dissolved iron measurement would be more appropriate because some permits do have effluent limitations which are expressed in terms of dissolved iron.

53. The Agency came to believe that it would be easier to address both iron and manganese on a case-by-case basis. The Agency also noted that the addition of biocriteria to the rules would give the Agency another tool to deal with problems with background concentrations exceed criteria or standards. For all these reasons, the Agency determined to withdraw the proposed water quality standards for both iron and manganese. Post-Hearing Response to Public Comments, at pp. 10-12 and Final Comments at pp. 17-19. Minn. Stat. 14.05, subd. 3 permits an

agency to withdraw a proposed rule at any time prior to filing it with the Secretary of State, but it must publish notice that the proposed rule has been withdrawn in the State Register. So long as the Agency published its withdrawal of the two proposed standards, the Administrative Law Judge accepts it as valid.

Cobalt

54. The Agency is proposing to add a cobalt standard for Class 2 waters. The Class 2A and 2Bd standard would be 2.8 ug/l chronic, 436 ug/l maximum, and 872 ug/l final. For Class 2B waters, the chronic number would go from 2.8 ug/l to 5 ug/l. That same number (5 ug/l) is then carried through to other classes which incorporate the 2B standard by reference.

55. The Agency reported that a cobalt standard has been used to set permit limitations for leachate from mining operations, as well as to assess conditions at two landfill leachate sites and two contaminated ground water sites. The proposed standards are human health-based for Class 2A and 2Bd waters and toxicity-based for Class 2B, 2C and 2D waters.

56. The proposed standard drew comments from a number of sources. The Department of Natural Resources and Cleveland Cliffs, Inc. both referred to bioassay data which indicated that an appropriate toxicity-based limit would be closer to 50 ug/l rather than the 5 ug/l which the Agency had proposed. Both appeared to be referring to the SONAR's discussion of a site-specific determination which was made for LTV Steel/Erie Corporation permit for the Dunka pit discharges. See, SONAR at p. 114. The Agency explains there, and in their Final Comments, that the water from the Dunka stockpile seeps has a very high total hardness, and that the bioassay data for cobalt indicates that high hardness can mitigate cobalt toxicity. However, the Agency does not feel it has enough data to support a hardness-based standard for cobalt. The Agency indicated it is willing to consider higher levels than the 5 ug/l pursuant to part 7050.0222, subpart 8, which allows for site-specific modification of standards if local conditions and data support it. Unstated, however, is the fact that a bioassay is very expensive, and the cost would be upon the person seeking a higher limit.

57. Northern States Power Company, as well as the Department, both commented they have background samples which show cobalt at greater than 5 ug/l. DNR referred to background samples collected in northern Minnesota, while NSP referred to its water chemistry monitoring data at various sites on the Minnesota and Mississippi Rivers. The Agency staff could not agree with DNR's statement, because out of 521 water samples tested in northern Minnesota, only one sample is above the standard. Final Comments, p. 21. In the SONAR, the Agency reported that data from a copper-nickel study in northeastern Minnesota reported most concentrations to be below detection limits of 0.2 to 0.5 ug/l, even though the study made special efforts to obtain the lowest detection limits possible. In response to the NSP data, the Agency responded that its data showed only occasional exceedences in the Minnesota and Mississippi Rivers, and that in

general, concentrations range from about 1.0 to 2.2 ug/l in rivers across the state. The staff also noted that where natural background conditions exceed the proposed standard, the natural background levels may be used as the standard, in place of the proposed rule, or, as was done in the case of the Dunka seeps, the bioassay may be performed.

58. The Administrative Law Judge concludes that the Agency has followed an appropriate method for setting the cobalt standards. The Agency has demonstrated the need for and reasonableness of its proposed cobalt standards.

59. The Administrative Law Judge has reviewed the other comments relating to the various standards, and finds that the Agency has justified them. In particular, the Administrative Law Judge would note that where the Agency has not proposed a change to a standard, that standard is not "fair game" for action in this rulemaking proceeding.

60. A number of other commentators suggested changes to portions of the rules which were not proposed for change by the Agency. For example, 3M Corporation pointed out that the state's chronic standard for mercury was substantially different from the national chronic criterion, and that the Minnesota standard was established using a reference dose which has now been changed in the most recent EPA IRIS database. The Agency responded that it was aware of these matters, but had decided to leave the current standard unchanged because it lacked the time and resources to thoroughly research the new mercury data for this round of amendments. The Agency indicated that it was willing to work with 3M and other interested persons to address establishing a new mercury standard in the future. SONAR at 76 and Final Comments at pp. 23-25. The Administrative Law Judge agrees that the Agency does not have to justify the need for and reasonableness of retaining an existing rule which is not proposed for amendment by the Agency. Therefore, no action is needed in connection with this, and other similar comments relating to other standards. Persons concerned about portions of rules which were not proposed for change in this proceeding should contact the Agency and urge that their concerns be addressed in the next rulemaking proceeding.

Animal Feedlot Standards

61. The Agency's existing rules contain an effluent limitation, for non-federally regulated feedlots, of 25 milligrams per liter of five-day BOD. Part 7050.0215, subp. 2 A. The Agency proposed to replace that limitation with achieving a score of zero using a feedlot evaluation system model which had been developed by the ASCS, SCS, the Minnesota Soil & Water Conservation Board (now part of BOWSR), and the MPCA. The Agency estimated that the model rating of zero corresponds to an estimated discharge of 25 mg/l BOD, and therefore the proposed change would not affect the environment or the feedlot operator -- it was merely a change in how rule compliance would be measured. Despite the fact that the Agency had worked with a feedlot advisory group including representatives from the State

Cattlemen's Association, the Farm Bureau, the Farmers' Union, the Dairy Herd Improvement Association, the Pork Producers, National Farm Organization, the Turkey Growers' Association, as well as staff from the SCS, Extension Service, Soil and Water Conservation Districts, BOWSR, DNR, the Department of Agriculture, University of Minnesota, and others, all of whom were informed of the proposed change and none of whom objected to it, the Agency ran into a "beehive" of opposition at the Rochester hearing. This opposition appears to have be generated by one or two individuals who attempted to obtain the model, were unable to do so (as a practical matter), and thus were forced to make certain assumptions about the impact of the rule. In a short period of time, they were able to generate substantial opposition to the rule and a sizable turnout of individuals at the Rochester hearing.

62. After evaluating the events at the Rochester hearing, and the obvious lack of information among individual producers, along with some technical problems presented by the availability (or unavailability) of the model, the Agency determined to withdraw the proposed change to its existing rule, and allow the existing rule to remain in its current form. As noted earlier, Minn. Stat. 14.05 authorizes an agency to withdraw a proposed rule at any time during the rulemaking process, so long as it gives notice of the withdrawal in the State Register.

Classification of Particular Water Bodies: Introduction

63. The most contentious issues in this rulemaking proceeding involved the propriety of a handful of reclassifications of water bodies. While each of them will be discussed in detail below, it is appropriate to outline the legal framework of the classification system.

64. The Federal Clean Water Act, 33 U.S.C. 1251, et seq., is designed to "restore and maintain the chemical, physical, and biological integrity" of the Nation's waters through prevention, reduction, and the eventual elimination of pollution. It contains a two-step process to achieve that national goal. The first step is to improve water quality sufficiently, wherever attainable, to meet an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water. The second step is the total elimination of discharge pollutants. As noted earlier, the Act provides for a partnership between the federal government and the states. The major responsibility of the federal government (the Environmental Protection Agency) is the adoption of uniform, national technology-based standards, known as effluent limitations guidelines, for certain categories and classes of discharges. The Act also requires states, with federal oversight and approval, to institute certain requirements to assure protection of the quality of all state waters. These water quality standards are not technology-based standards but are, instead, based upon the desired uses of those waters and the conditions required to support those uses. Water quality standards are used as a supplementary basis for effluent limitations to prevent water quality from falling below

acceptable levels.

65. Under the federal Act, water quality standards generally consist of three elements: (1) a designated "use" of the water body (such as domestic water supply, recreation, propagation of fish, agricultural, industrial, etc.) consistent with the goals of the Act; (2) criteria specifying the amount of various pollutants that may be present in those water bodies and still protect the designated uses; and (3) an antidegradation provision. A water quality standard defines the water quality goals of a water body by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses.

66. Each state must include use designations in its standards that are consistent with and serve the purposes of the Act. This means that the standards should, wherever attainable, provide water quality for the "protection and propagation of fish, shellfish and wildlife and for recreation in and on the water." This is the basis for the so-called "fishable/swimmable" goal.

67. Minnesota has seven classes of waters based upon uses. These classes are explained in part 7050.0220 of the proposed rule. Each class has certain standards applied to it so that the quality level of the class may be maintained.

68. Of particular interest in this proceeding are the descriptions given to Class 1 waters, Class 2 waters and Class 7 waters. Class 1 waters are for drinking, with four separate subclasses depending upon the amount of treatment needed to meet drinking water standards. Class 2 waters are for fishing and aquatic recreation. There are four separate subclasses, depending on what kind of fish and what level of body contact are involved. Class 7 waters, finally, are waters where the Class 2 uses do not exist and the national "fishable/swimmable" goal is not believed to be attainable.

69. The rules contain listings of particular classifications for several hundred waters around the state. However, not every lake, river, stream or other water body is specifically identified. For those "unlisted waters", existing rule 7050.0430 provides that they shall be classified as a Class 2B, 3B, 4A, 4B, 5 and 6 water. The only exception to this is for designated trout streams or trout lakes.

Viking Fen

70. There are three small calcarious fen areas located in the northwestern corner of the state, in Marshall County, all referred to as portions of the Viking fen. The three areas are labeled "Viking fen, 68", "Viking fen, 70", and Viking strip fen, 69". Each has been identified by the Department of Natural Resources as a calcarious fen. As with virtually all other calcarious fens in the state, the Pollution Control Agency is proposing to identify them as outstanding resource value waters (ORVWs). In general, calcarious fens are fed by ground water and maintain a constant microenvironment which remains stable for

many years. For this reason, fens often harbor relict plant species that are uncharacteristic or absent from other areas. The Wetlands Conservation Act contains a specific provision for calcarious fens, prohibiting their filling, drainage, or degradation without approval from the Commissioner of Natural Resources. Minn. Stat. 103G.223. The Board of Water and Soil Resources has provided special rules for them. The Pollution Control Agency, in these rules, is proposing to classify the three Viking fen areas as outstanding resource value waters, which will result in a prohibition against any new or expanded discharges of wastes to them unless there is no prudent and feasible alternative to the discharge.

71. A letter was received from a landowner affected by the addition of the Viking fen, 70. He asked that the fen not be added to the list of ORVWs. He thought that protecting the plant species ("weeds, to most people") was a waste of money, and that the money could be better spent on flood victims, the hungry, or the homeless. He was particularly concerned that he received no compensation for leaving this land idle, yet he had to pay taxes on it.

72. The Administrative Law Judge concludes that the commentator's primary concern should be directed to the Legislature, not the Agency, because it is the prohibitions of the Wetland Conservation Act that most seriously impact his use of the land. However, to the extent he is challenging the reasonableness of the inclusion of the fen in the list of outstanding value resource waters, the Administrative Law Judge finds that the Agency has demonstrated the need for and reasonableness of classifying all such fens as ORVWs in order to protect the plants.

Active Mining Pits

73. The Agency initially proposed to classify 18 surface waters as Class 1C waters which had not previously been in that class. These were waters which had been identified by the Minnesota Department of Health as public water supply system sources. A public water supply system is a system supplying piped water for human consumption which has a minimum of 15 service connections of 15 living units, or serves at least 25 persons daily for 60 days of the year. Minn. Rules pt. 4720.0100, subp. 16. Public water supplies are divided into three categories: community water supplies, noncommunity water supplies, and nontransient, noncommunity water supplies. Examples of these three categories are listed below:

1. A community water supply system serves at least 15 service connections or living units used by year-round residents, or regularly serves at least 25 year-round residents. Examples of these types of systems are: municipalities, mobile home

parks, and apartments.

2. A noncommunity water system is a public water system that serves the traveling or transient population. Examples of such systems include: hotels, motels, resorts, restaurants, campgrounds, recreation areas, churches, and gas stations.

3. A noncommunity, nontransient water system is a public water supply system that regularly serves at least 25 of the same persons over six months per year. Examples include: schools, day-care facilities, factories, and businesses.

74. Among the waters proposed to receive the 1C classification were the Enterprise Mine Pit Lake, the Fraser Mine Pit Lake, the Morton Mine Pit Lake, the Mountain Iron Mine Pit Lake, and the Scranton Mine Pit Lake (Hull-Rust-Mahoning-Scranton-Susquehanna).

75. Each of the above-listed mine pit lakes were identified by the Minnesota Department of Health as surface water source supplies for either community or noncommunity/nontransient public water supply systems. Exhibit C42.

76. The Enterprise Mine Pit Lake was initially identified by the Department of Health as a noncommunity/nontransient public water supply. Exhibit C42. On April 1, 1993, Inland Steel Mining Company sent a letter to the Agency (Exhibit C58) indicating that although at the current time water from the Enterprise Pit was pumped to the plant and used for drinking water purposes, the company was proposing to discontinue this use in favor of obtaining its drinking water from wells. On April 27, 1993, the Agency issued its Statement of Need and Reasonableness. It included a proposal to classify the Enterprise Mine Pit Lake as a Class 1C use. When the rules were published in the State Register of July 19, 1993, the proposed reclassification was included among them. On May 3, 1993, Inland again wrote the Agency, indicating that it now set a date of June 1, 1993 as the date that it would no longer be drawing drinking water from the Enterprise Mine Pit Lake. Inland requested that the Agency withdraw its proposed reclassification for the Enterprise Pit. Agency Exhibit 5. At the start of the public hearing process, the Agency announced that it was withdrawing its proposed reclassification of the Enterprise Pit in light of the cessation of obtaining drinking water from the pit. Tr. 1, p. 29. The Agency confirmed this change in its Exhibit 13 and Attachment 19 to its final comments. There was no opposition to the Agency's withdrawal of the proposed reclassification.

77. The Mountain Iron Mine Pit Lake was initially identified by the Department of Health as a noncommunity/nontransient public water supply in Exhibit C42. The Agency proposed to classify it as a 1C water in the proposed rules. However, on September 23, 1993, the Agency sent letters to a number of individuals and the Hibbing Public Utilities Commission, indicating that it had

determined to withdraw its proposed reclassification for the Mountain Iron Mine Pit. The Agency gave two reasons for this withdrawal: that active mining operations were still continuing in the Mountain Iron Pit, and the pit was considered to be part of the Minntac mining facility pursuant to the current Agency water quality permit and, therefore, the pit is not considered a "water of the state". The Agency asserted that the existing permits which cover the mining operation do emphasize the importance of protecting ground water for potable water uses and thus the proposed reclassification to Class 1C would not change the level of protection for that use. Post-Hearing Response at pp. 76-77 and Attachments 57-60. There was no opposition to the proposed withdrawal.

78. The Scranton Mine Pit Lake (Hull-Rust-Mahoning-Scranton-Susquehanna) was initially identified by the Department of Health as a noncommunity/ nontransient public water supply, providing water to Hibbing Taconite Company. The Agency initially proposed to classify this as a 1C water. However, in exactly the same way as it treated the Mountain Iron Mine Pit Lake noted above, the Agency decided after the comment period to withdraw its proposed reclassification. No opposition was voiced to the proposed withdrawal.

79. The Morton Mine Pit Lake was identified by the Department of Health as a noncommunity/nontransient public water supply, serving the Hibbing Taconite Company. Exhibit C42. The Agency proposed to reclassify it to a Class 1C water. However, unlike the Mountain Iron and Scranton cases, the Agency has not proposed to withdraw that classification. By letter dated September 28, the Iron Mining Association of Minnesota submitted a comment (on stationery of Cleveland-Cliffs, Inc.) indicating that it saw no reason why the Morton Mine Pit Lake should not be withdrawn on the same basis as the Mountain Iron and Scranton Lakes were withdrawn. In their Final Comments, the Agency indicated that it did not withdraw the proposed reclassification because the Morton Mine Pit Lake is not identified in the NPDES/SDS permit for Hibbing Taconite Company as being part of the active mining operations within the permitted facility and thus the water quality provisions of that permit did not include the Morton pit. The Agency considers the lake to be "waters of the state". Since it was used for public water supply purposes, the Agency believed the 1C classification was still appropriate. The Administrative Law Judge finds the Agency has justified its proposal to classify the Morton Mine Pit Lake as 1C.

Proposed Reclassification: North Branch Rush River (County Ditch No. 55)
at Gaylord

80. Lateral Ditch C of County Ditch 55, and County Ditch 55 itself (which is also known as the North Branch of the Rush River) carry water from the outlet of Titlow Lake in a generally southeasterly direction toward the Minnesota River, a distance of approximately 30 miles. The Agency has proposed to reclassify the uppermost portion of this waterway (approximately eight river

miles) from the present Class 2B classification to Class 7. The remainder of the waters, down to the mouth of the Minnesota River, would retain their Class 2B status.

81. The proposed stretch is not used for swimming or other recreation. Its potential for such use is limited at best.

82. The proposed reclassification was opposed by the Department of Natural Resources. The Department, like the Agency, did not believe that the stretch in question contained valuable habitat for game fish. However, the Department was concerned about the effect of the reclassification of this upper stretch on downstream reaches. A 1991 memo indicated the Department would be supportive of granting a temporary variance to allow discharges to reach Class 7 levels in the uppermost reaches, if it was coupled with downstream monitoring to determine if there are significant impacts on the downstream resource. In fact, a variance was granted in 1991, and presumably discharges have been made closer to Class 7 standards than Class 2B standards. Unfortunately, there is no evidence in the record to demonstrate whether or not there has been an adverse impact on the downstream water quality. The record does demonstrate, however, that the upper portions of the ditch system and the north branch of the river, down to approximately County Road 9 crossing south of New Rome, have been extensively channelized with uniform cross-sectional width and depth. This channelization has destroyed any suitable habitat. In contrast, the lower portion of the Rush River (below the County Road 9 crossing) has not been ditched or otherwise extensively altered. It offers escape cover for game fish and suitable spawning habitat for many fish species. This lower portion may provide important production areas for fish species common in the Minnesota River. Exhibit C46.

83. The current NPDES/SDS permit for the Gaylord/Waldbaum waste water treatment facility does require instream monitoring to assure that Class 2 water quality standards are maintained at the point where the proposed Class 7 segment ends, and the Class 2B segment would begin. The data from that monitoring, however, is not in the record.

84. The Administrative Law Judge concludes that the Agency has demonstrated the need for and reasonableness of its proposed reclassification. While it would have been desirable to have monitoring data in the record showing the effect of the 1991 variance on the downstream stretch, it could be argued that the unusual rainfall and moisture conditions of 1992 and 1993 would render such data inconclusive. The record contains ample evidence of such severe channelization of the segment at issue such that it, along with the absence of actual or potential recreational use, supports the Class 7 designation, even without the monitoring data.

Proposed Reclassification: Center Creek Below Fairmont

85. Center Creek is approximately 31 river miles in length. It runs from the outlet of Lake George, in the City of Fairmont,

to the Blue Earth River, south of Winnebago. It runs through the City of Granada and through the cities of Huntley and Winnebago. Center Creek is a marginal water body from the standpoint of fishing and recreation. At its uppermost reaches, in and near the city of Fairmont, it has little recreational or fisheries value. At its lowermost reaches, however, it does have both fisheries and recreational value. Reasonable people have differed over the appropriate classification of Center Creek, because of the noticeable difference between the upstream part and the downstream part.

86. The present controversy over the classification of Center Creek began in 1988, when the Agency issued a waste load allocation study of the various pollutants in Center Creek. The study proposed that the City's waste water treatment plant (whose permit was scheduled to expire on June 30, 1992) be required to meet a variety of effluent limitations, including ammonia limitations which would range from 1 mg/l in the summertime to 10 mg/l in the winter. The City's plant was built in 1973, but was not designed to remove ammonia. It has been well maintained, and the City hopes to continue to use it for 20 or 30 more years.

87. The waste load allocation study was part of an ongoing series of negotiations regarding the City's ammonia discharges. Tr. 7, p. 88. The City was also concerned about its ability to meet a proposed copper limitation. The City requested a variance from the ammonia and copper effluent limits in the proposed permit. By mutual agreement, the variance request was put "on hold" until the reclassification decision could be made. Tr. 7, pp. 14-15.

88. In March of 1992, the City formally requested that Center Creek be reclassified from a Class 2B water to a Class 7 water. Exhibit C52. The Agency responded that a triennual rule revision was scheduled for 1993, and that the requested reclassification of Center Creek would be considered during that process. Exhibit C53.

89. Center Creek has been classified as a Class 2B water since 1973, and that classification has applied continuously to the current date. Over the years, additional classifications relating to agriculture, industry, and other uses have been added, but the Class 2B designation has remained throughout.

90. Class 2B waters are described as:

> . . . all waters of the state which are or may be used for fishing, fish culture, bathing, or any other recreational purposes, and for which quality control is or may be necessary to protect aquatic or terrestrial life or their habitats, or the public health, safety or welfare.

Minn. Rule Part 7050.0200.

In the rule that sets forth the detail standards for Class 2B waters, the following text appears:

The quality of this class of surface waters shall be such as to permit the propagation and maintenance of cool or warm water sport or commercial fishes and their habitats and be suitable for aquatic recreation of all kinds, including bathing, for which the waters may be usable. This class of surface water is not protected as a source of drinking water.

91. Class 7 waters are described as follows:

. . . surface waters of the state which are of limited value as a water resource and where water quantities are intermittent or less than one cubic foot per second at the once in ten year, seven-day low flow . . . . These waters shall be protected so as to allow secondary body contact use, to preserve the ground water for use as a potable water supply, and to protect the aesthetic qualities of the water. It is the intent of the agency that very few waters be classified as limited resource value waters. In conjunction with those factors listed in Minn. Stat. 115.44, subds. 2 and 3, the Agency, in cooperation and agreement with the Department of Natural Resources with respect to determination of fisheries values and potential, shall determine the extent to which the waters of the state demonstrate the conditions set forth below.

a. The existing fishery and potential fishery are severely limited by natural conditions as exhibited by poor water quality characteristics, lack of habitat, or lack of water; or

> b. The quality of the resource has been significantly altered by human activity and the effect is essentially irreversible; and
>
> c. There are limited recreational activities (such as fishing, swimming, wading or boating) in and on the water resource.
>
> Conditions "a" and "c" or "b" and "c" must be established by the agency water assessment procedure before the waters can be classified as limited resource value waters.

Minn. Rule Part 7050.0200.

In the section setting forth the limitations for Class 7 waters, the following text appears:

> The quality of this class of waters of the state shall be such as to protect aesthetic qualities, secondary body contact use, and ground water for use as a potable water supply.

92. Translating the differences between the two classes into ordinary language, Class 2B waters will support cool or warm water sport or commercial fish, and will also allow primary body contact (swimming, tubing, and wading where there is a likelihood of incidental water ingestion and/or immersion). Class 7 waters will not support any long-term fish population, nor will they allow swimming, tubing, or other activities which could involve water ingestion and/or immersion. Fecal coliform organisms, for example, in a Class 2B water, are essentially limited to not more than 200 organisms per 100 milliters of water. In Class 7 waters, the limitation is essentially not more than 1,000 organisms per 100 milliliters of water. The limitations on Class 2B waters include specific limitations on such substances as arsenic, benezene, cyanide, DDT, lead, mercury, and similar elements. Class 7 waters, on the other hand, do not contain any such specific limitations, but only a general restriction on toxic pollutants, which are "not to be allowed in such quantities or concentrations that will impair the specified uses."

93. It is clear from the testimony at the public hearing in Fairmont and the written submissions from both upstream and downstream reaches, that there is a dramatic difference between the actual and potential uses of Center Creek near Fairmont, at one end, as compared with the actual and potential uses of Center Creek at Granada and downstream to the confluence with Blue Earth River. In and near Fairmont, Center Creek is not viewed as a fishing resource. It is not viewed as a recreational resource. People do not report either fishing themselves, or seeing others fish (except for the area immediately below the Lake George Dam). People do not report tubing, wading, or other recreational uses of the river, nor do they report having seen others using it for recreation. Testimony and comments from residents of Fairmont is almost universally to that effect. Fairmont residents contrasted this bleak picture with a very positive report on the fishing and recreational opportunities in the Fairmont chain of lakes which

are extensively used by citizens (both local and tourist) as the primary fishing and recreational resource in the area. One witness estimated that 98% of the fishing in the community is done in the city's lakes. Tr. 7, p. 37. Of the 27 public witnesses who spoke at the evening hearing in Fairmont, only one reported any meaningful fishing and recreational use of Center Creek, and that individual was from Granada, and was reporting on uses in Granada, not in Fairmont. Id. at pp. 65-66.

94. In stark contrast to the public testimony at Fairmont, the record contains a number of written submissions from persons in Granada, Huntley, and Winnebago regarding fishing, wading, tubing, and similar activities at the downstream end of the river. Some examples are set forth below (references are to Attachments to the Agency's Final Comments):

> A woman who now lives in New Mexico, but visits her parents who live on Center Creek in Faribault County, indicated her children play in the water. "They fish, wade, build dams, dig for clams, find turtles, etc." They have taken tubes down the creek. They have observed wild life along the creek.
>
> A Faribault County family reports that they live about one city block from the creek and both their children and grandchildren swim, wade, innertube, boat and fish in the creek. Attachment 3.
>
> A person who lives south of Winnebago indicated that he and his grandchildren fish in Center Creek, catching northerns, walleyes, catfish, bullheads and carp. Attachment 4. Similar statements were made in Attachment 5.
>
> The Senior Patrol leader of Boy Scout Troop 148 who lives about halfway between Huntley and Winnebago indicated that he has played and fished in the creek, as well as camping and swimming there as part of his Boy Scout activities. Attachment 6.
>
> A farmer at River Mile 5.5 reported his grandchildren fishing in the creek, and also tubing. His primary concern, however, was the health of his cattle who drink the water. Attachment 7.
> A farmer at River Mile 7.3 reported finding a fishing line caught in his fence every now and then, and the creek being used by wildlife. Attachment 8.
>
> A farmer south of Huntley reported people fishing off the bridge "all the time". Attachment 9.
>
> The City of Granada reported children fishing off the bridge and rafting and wading in the creek. Attachment 10. Another Granada resident reported regularly having neighborhood boys riding their bikes down the creek path to take a swim. Attachment 11.

A Granada resident whose six children all swam, fished, and rafted on the creek indicated that Center Creek was "Granada's lake". Attachment 12.

The Verona Township Board of Supervisors indicated that residents of Verona Township (in the Huntley-Winnebago area) do use the creek for fishing and recreation. Attachment 18.

95. Another sharp contrast between the testimony of the residents at Fairmont and the written submissions from the Granada and downstream persons relates to the flow in the stream. In Fairmont, there is little or no flow in the stream most of the time, particularly above the waste water treatment plant. The stream goes dry, and totally freezes in the winter. This is far different from the testimony of the downstream residents, a number of whom say that they have never seen the stream dry up. Attachments 2, 3, 4, 5 and 11.

96. There is no regular gauging station on Center Creek. The creek begins at the Lake George Dam, and the city has records of the flow over the Lake George Dam. Those records (Public Ex. 8, as supplemented by seasonal records submitted by the City on September 29) demonstrate that between 1982 and 1991, each year had periods of time during which there was no flow over the dam. The common scenario was for flows to begin in the spring and early summer, but then to taper off in the late summer and through the winter. Only 1992 and 1993 (through the end of August) had water flowing over the dam every day. However, Lake George is not the sole source of water into the stream above the treatment plant. The cumulative total drainage area of Center Creek at its mouth is 136 square miles. The area above the outlet of Lake George is 43 square miles, Lily Creek (which enters Center Creek between the Lake George Dam and the treatment plant) and other lesser areas result in a total drainage area above the waste water treatment plant (exclusive of the Lake George drainage area) of 48 square miles. So one-third of the total drainage area goes over the Lake George Dam, one-third of the drainage area enters between the dam and the treatment plant, and the remaining one-third is between the treatment plant and the mouth.

97. The 7Q10 flow for the creek above the plant is zero cfs. The average annual design flow for the plant itself is 4.4 cfs. Therefore, during times of low flow conditions, the discharge of treated waste water from the plant provides nearly all of the stream flow in the vicinity of the city.

98. On August 3, 1988, MPCA staff gauged the creek at River Mile 23.7, which is about five river miles below the plant discharge. They determined the stream flow to be between 3.6 and 3.8 CFS. Upstream of that location, at the Interstate 90 crossing which is River Mile 25.8, the flow on that date was 2.14 CFS. Yet on that date, the city's records show there was no flow over the Lake George Dam, and there had not been any flow over the dam since mid-June. Therefore, the flow over the Lake George Dam is not determinative of water levels in the stream below the plant. But most of the flow in the creek at dry times does come

from the plant.

99. By combing through the surveys and other data in the record, the Agency found a total of eight instances where water levels were actually measured at River Mile 28.9, which is just upstream of the treatment plant outfall. The waters passing that point would include waters which had come over the dam, plus waters from the Lily Creek Watershed and other smaller sources above the treatment plant. While the data is bunched and is so limited that it is impossible to draw any concrete conclusions from it, it does call into question the assertion that the Lake George data is an accurate representation of the total flow immediately above the treatment plant. See, Attachment 6 to Post-Hearing Response.

100. The Blue Earth River Basin Initiative is a five-county joint powers cooperative agency dedicated to improving the water quality of the Blue Earth River Basin. It is opposed to the reclassification of Center Creek because it believes that the human alterations are reversible and recreational opportunities, along with some fishing, are available. Letter of August 23, 1993.

101. The Department of Natural Resources opposes reclassification of Center Creek. The Department points out that the Governor has directed state agencies to make the Minnesota River "swimmable and fishable" within ten years, and this will require significant reductions of discharges from both urban and rural resources. The Department believes it would be unfair to rural landowners, who are being forced to bring their operations into compliance, if the city were allowed to meet more liberal effluent standards. However, the Department recognizes the economic burden which an immediate nitrification upgrade would pose upon the city, and suggests that a temporary variance from the Class 2B ammonia standard be granted to the city to allow additional time to search for less expensive alternatives.

102. The Department's position is also based upon stream surveys conducted in 1986 and 1992. The DNR survey data from 1986 demonstrates that the predominant fish throughout the creek are rough fish, such as bullheads, carp and suckers. However, at each of four locations surveyed, there was at least one game fish, such as a northern pike, sunfish, or perch. Exhibit C51.

103. The 1992 assessment included a DNR fish survey which was conducted on September 21 and 22, 1992. Water was flowing over the Lake George Dam throughout the entire winter, spring and summer of 1992. It was a very wet year. The number and type of fish found in the 1992 survey were roughly the same as those found in the 1986 survey, except that walleyes replaced northern pike. Exhibit C51.

104. The fish survey data is consistent with the reports of downstream landowners and creek users to the effect that the creek does support a fishery, but primarily rough fish.

105. The habitat along Center Creek is, for the most part, adequate for fish. The stream exhibits little channelization,

and there are log jams, boulders, some tree cover and a diverse bottom substream, all of which are conducive to good fish habitat. Exhibit C51.

106. The stream also contains pools, which trap fish when flows diminish. During the September 1992 stream survey, pools with depths in excess of four feet were located. These pools would have 2.5 to 3.0 feet of water in them even under low flow conditions. Tr. 9, pp. 79 to 86.

107. Center Creek has a history of being used for discharge of pollutants. The record contains newspaper articles from 1945 (headline: "Tons of Fish Dying, Rot in Center Creek") and reports of fish kills, damage to livestock, and citizen complaints in 1950, 1957, and 1966. Center Creek contains numerous pastures adjacent to the waterway which contribute animal wastes, decaying plant life, and runoff from adjacent farm land. The city's operating personnel located a point source discharge from an agricultural operation which is discharging water (intermittently) which is much more polluted than that coming from the treatment plant. See, September 29 City Submissions "Other Sources of Nitrogen on Center Creek". It is widely recognized that nonpoint sources are a substantial contribution to pollution of the Minnesota River. However, steps are being taken to enforce pollution from feedlot and other agricultural sources as part of activities to improve the Minnesota and Blue Earth Rivers. Tr. 6, pp. 72-75. As the DNR's regional administrator indicated, farmers will be even less willing to spend money on cleanup if they perceive (rightly or wrongly) that cities are being allowed to increase their pollution. Id., p. 78.

108. It is not practical to divide Center Creek into two reaches, one of which would be classified as Class 2B, the other of which would be classified as Class 7. There is inadequate dilution from the watershed below the treatment plant to permit such a resolution, and neither the city nor the agency have proposed it.

109. The city has offered to voluntarily limit its effluent if the proposed reclassification is granted. The city would retain all of the conditions in its present permit, plus it would accept additional restrictions relating to dechlorination and minimum dissolved oxygen content in the effluent. Tr. 6, pp. 88-89. In response to those who claim that the proposed reclassification would allow the city to put more pollutants into the creek, the city responds that this offer would result in the same effluent conditions as currently exist, and, in the case of chlorination and dissolved oxygen, even better effluent. However, such an agreement would not restrict others from taking advantage of the Class 7 designation.

110. The city's primary concern over the retention of the Class 2B designation is the cost of upgrading its plant to meet the proposed ammonia limitation. The plant was never designed to limit ammonia, and cannot be operated to limit ammonia without substantial revision. If the city were to build a new treatment facility, the construction cost would be $11.973 million if the

city had to meet an ammonia limitation, while it would be $10.2 million if there were no ammonia limitation. The incremental difference is $1.77 million. In contrast, it would cost $8.768 million to rehabilitate the existing facility to enable it to meet the proposed ammonia limitation. If the city were to finance the facility at a six percent interest rate for 20 years, the total average domestic user charge would go from the current amount of roughly $22.00 to $44.00 for a new facility that met the ammonia limitation, $40.00 for a new facility that did not meet the ammonia limitation, and $40.00 to rehabilitate the existing plant to meet the ammonia limitation. Those figures would be slightly less if the interest rate were less than six percent. However, the ratios remain the same. Agency Ex. 23.

111. The city lost 850 jobs due to the closing of the PictSweet/United Foods plant in 1992. Fairmont Foods which used to be the second largest employer, is now the largest employer, at 425 persons. Fairmont Foods is currently considering expanding in Iowa, rather than Fairmont, citing Fairmont's current high sewer, water and electric rates, as well as workers' compensation costs. Fairmont Foods has provided 18 to 25% of the operating revenues of the waste water treatment facility over the last three years. The City is concerned that if it did build a new plant, or rehabilitate its existing plant, and then Fairmont Foods were to relocate to another community, rates for the remaining residents and businesses would "skyrocket". Tr. 6, at 132.

112. Fairmont residents are concerned about their jobs and the economic health of the city. Tr. 7, p. 78. They assert that common sense and reasonableness dictate that $9 to 12 million dollars is too much to spend for the limited uses offered by the creek. Tr. 7, at p. 28. They would far prefer to spend cleanup money on their chain of lakes, which offer more and better fishing and recreation than does Center Creek.

113. Minn. Stat. 115.43, subd. 1 (1992) provides, in part:

> In exercising all such powers, the agency shall give due consideration to the establishment, maintenance, operation and expansion of business, commerce, trade, industry, traffic, and other economic factors and other material matters affecting the feasibility and practicality of any proposed action, including, but not limited to, the burden on a municipality of any tax which may result therefrom and shall take or provide for such action as may be reasonable, feasible, and practical under the circumstances.

The Agency has suggested that since other statutes and rules provide a process for variances from effluent limitations in the case of "exceptional circumstances . . . caus[ing] undue hardship", that the Agency need not consider the economic impact of the classification until a variance proceeding. That is incorrect. The clear language of the statute quoted above requires that due consideration to economics be given at all

times, and the tax burden resulting from an agency proposed action must explicitly be considered. The Agency may not disregard economics when considering a stream classification.

Despite the foregoing legal error, the Administrative Law Judge concludes that the Agency has indicated a sensitivity to, and has adequately considered, the cost issues involved. The Agency has noted that there would be lower incremental costs in applying the ammonia limitation when a new plant is built, rather than trying to retrofit the old plant. The Agency indicated it would give "serious consideration" to an alternative that would delay the implementation of ammonia removal until a new facility could be constructed. The Agency stated that, in essence, the effective date of the ammonia effluent limitation could be delayed by variance until a new facility was in the facility-planning stage. Tr. 9, at pp. 93-95 and Final Comments, at pp. 57-58. In support of this, the Agency pointed out it had already preliminarily determined to support a copper variance for Fairmont. Id.

114. Based on all of the evidence in the record, the Administrative Law Judge concludes that the appropriate classification for Center Creek is Class 2B, rather than Class 7. From Granada downstream, the creek is regularly being used for fishing and swimming. Class 2B limits protect swimmers, while Class 7 ones do not. While swimmers would be protected by the City's offer to maintain and improve its effluent, other current and potential dischargers would not be bound by Fairmont's assurances. Under the facts and circumstances recited above, the stream must be classified as Class 2B, rather than Class 7. It would be appropriate, however, for the Agency to begin the process of considering the variance request reasonably promptly.

Proposed Reclassification: Fraser Mine Pit Lake at Chisholm

115. The record contains numerous documents setting forth the history of the City of Chisholm's use of the Fraser Mine Pit Lake for its drinking water supply, and Aquafarms' past and proposed future use of the same water body for aquaculture. The record also contains a substantial amount of legal argument regarding numerous legal claims by both city and Aquafarms. As was noted in an earlier footnote, the Administrative Law Judge has no authority nor desire to attempt to adjudicate most of the disputes which are presented in the record. Instead, focus is limited to the Agency's proposed reclassification of the Fraser Mine Pit Lake from Class 2B (and other classes) to Class 1C (and other classes). While some of Aquafarms' issues have been addressed above, many of them must be addressed in other forums.

116. The City of Chisholm began using water from the Fraser Mine Pit Lake for its drinking supply in 1977, and executed a license agreement dated August 9, 1978 between United States Steel Corporation and the City. In 1978, the City laid a permanent water line from the Fraser Mine Pit. In 1987, Iron Range Aqua Farm, Inc. purchased certain parcels of real estate from USX Corporation, subject to

existing licenses. The original license agreement with U.S. Steel was subsequently assigned to Aquafarms. The City has, since at least 1978, withdrawn water from the pit lake and used it for drinking supply purposes. Unless the license is terminated earlier, it runs until December 31, 1997. However, due to disputes between the City and Aquafarms, the City did, in 1992, purchase other lands adjacent to the Fraser pit. The City believes this now grants it access to the mine pit and the right to withdraw waters separate from the license agreement. The City has let bids to construct a new pumping facility on this newly acquired property, and intends to continue to use the Fraser as its source of drinking water for the indefinite future.

117. The population of the City of Chisholm, according to the 1990 Census, was in excess of 5,000 persons. No one disputed that the City provides piped water for human consumption to at least 25 persons daily for 60 days of the year. Nor did any person suggest that the city's water system did not regularly serve at least 25 year-round residents. Those two numbers are the threshold test for classification as a "public water supply" and a "community water supply", respectively, as contained in Minn. Rule pt. 4720.0100.

118. The Minnesota Department of Health has listed the Fraser Mine Pit Lake at Chisholm as a community water supply source. Exhibit C42 and SONAR, pp. 87-88.

119. Minn. Rule pt. 7050.0200 describes Class 1 waters as follows:

> Domestic consumption includes all waters of the state which are or may be used as a source of supply for drinking, culinary or food processing use or other domestic purposes, and for which quality control is or may be necessary to protect the public health, safety, or welfare.

120. In light of the foregoing facts, the Administrative Law Judge concludes that the Agency has demonstrated the need for and reasonableness of its proposal to reclassify the Fraser Mine Pit Lake as a Class 1C water. None of the legal arguments raised by Aquafarms prohibit the Agency from proceeding with its proposed reclassification.

Proposed Reclassification: Hay Creek at Red Wing

121. Hay Creek is approximately 15 miles long. Its origins are in the upland south of the city of Red Wing. It flows in a northerly direction, reaching the western edge of the city, where it crosses Highway 61 and then enters into a marshy delta area before emptying into the Mississippi River. The upland areas of Hay Creek have been managed for some time by the Department of Natural Resources as a trout stream. The trout population is comprised mostly of wild brown trout. The record contains evidence of trout population surveys from 1975, 1983, 1989 and 1993.

122. The Department of Natural Resources designated the

upper reaches of Hay Creek, all but the bottom 3.6 miles, as a trout stream some years ago. The Pollution Control Agency, by adopting prior departmental orders, classified the upper portions of the stream as Class 2A waters. After the 1989 survey, the Department determined to add the remaining 3.6 miles of the creek to the list of trout waters. The Commissioner's Order designating this lower reach of Hay Creek as trout waters was published in the State Register on June 22, 1992. Exhibit C55 at 2914.

123. The Agency has now proposed to amend its rules to add the lower part of the creek to the list of listed trout waters, so that the Agency's rules would conform to the Department's designation. This would add the 2A classification to the lower 3.6 miles of the creek.

124. The S.B. Foot Tanning Company and the City of Red Wing are co-permittees of an NPDES permit for the discharge from a waste water treatment facility into lower Hay Creek. The point of discharge is approximately 1.7 miles from the junction of the creek and the Mississippi. Tr. 9, at pp. 41 and 49. Therefore, roughly one-half of the proposed reclassified section is upstream of the outfall, while roughly one-half is below it.

125. The treatment facility serves a number of industries, but the predominant contributor is S.B. Foot Tanning Company. Foot is a leather manufacturer which retans and finishes hides at the Red Wing facility. Tr. 9, at p. 21 and Public Ex. 12. Its wastes are discharged to the treatment plant, which processes them by screening, clarification, aeration, another clarification, and disinfection before discharging them to Hay Creek.

126. The proposed reclassification from Class 2B to 2A has raised two concerns for the City and the Foot tannery. The first concern is ammonia removal, and the second concern is a temperature limitation. Both the City and Foot have raised concerns about the Agency's compliance with a variety of statutory requirements, as well as questioning whether the Agency has demonstrated the reasonableness of the proposed reclassification in light of the cost.

127. Both the Agency and Foot have prepared cost estimates to bring the treatment plant into compliance with the ammonia standard for the 2A classification. However, neither has prepared a cost estimate for compliance with the temperature standard.

128. With regard to the ammonia standard, the Agency estimates a total capital cost of approximately $142,000. Final Comments, at p. 72. This assumes, however, that the ammonia standard can be met by optimizing the existing facility. Foot, on the other hand, estimates that in order to assure compliance, mere optimization of the existing facility will not be enough. Foot calculates that a second stage nitrification facility will have to be added. The cost of this would be in the range of $500,000. Public Ex. 12.

129. The existing standard for temperature for Class 2A waters is "no material increase". That standard is not proposed for amendment in this proceeding. Foot's expert indicated that he did not calculate the cost of compliance for that standard because he did not know what it meant. If taken literally, he did not think it could be achieved, as it is virtually impossible to control the temperature of a waste treatment effluent other than to allow it to approximate that of the ambient air, other than by literally heating it or refrigerating it after it is released from the treatment process. The expert (who was highly qualified to testify on the treatment of tannery wastes) was not aware of any facility which did that. He indicated that if the Agency truly meant that the effluent be warmed or cooled to match the temperature characteristics of the receiving stream, the economics of such a proposal for the Red Wing facility would be "inconceivable". Public Ex. 12.

130. In response, the Agency indicated that the "no material increase" thermal limit has been in the rules since 1967. The staff agreed with Foot's expert that if taken literally, it is unlikely that the Foot effluent (or any effluent) could comply with the rule. Staff indicated that historically, however, it had not read the limitation literally. Staff stated that it would not assign effluent limits to the plant's discharge to literally comply with the rule. Instead, it would allow a mixing zone to be used. It would evaluate instream temperature monitoring in order to determine what, if any, changes would be necessary to comply with the more restrictive standard. Post-Hearing Response, at p. 70 and Attachment 55. In other words, the staff does not now know what the standard actually will be, what will be required to meet whatever it is, and therefore, has no idea what the cost will be.

131. The Agency did acknowledge the need to reevaluate this narrative standard, and either define the term "material", or establish actual numeric temperature criteria for 2A waters. Post-Hearing Response at p. 70, Final Comments at p. 64. The Isaac Walton League submitted a letter indicating support for setting a thermal standard for cold water streams. The League did not, however, indicate any particular numbers, and the implication is that this would be done in the next revision of the rule. The League's comment is apparently independent of the Red Wing situation, as it made no reference to Red Wing.

132. The 1989 stream survey which triggered the Department of Natural Resources's designation of the lower reach of Hay Creek as a trout stream was based upon electroshocking at three locations in the creek. The first location was 1.7 miles from the mouth. It yielded four brown trout, and occasional suckers. The four trout were located just downstream of the treatment plant discharge. The second electroshocking location was 10.9 miles from the mouth. It yielded 89 brown trout. The third electroshocking location was 11.7 miles from the mouth. It yielded 207 brown trout. Therefore, the vast majority of the trout were located substantially upstream of the plant, in the upland reaches which are already classified by the Department

(and the Agency) for trout.

133. On August 26, 1993, after the hearings in this matter had commenced, the Department conducted another electroshocking survey at "station one", which begins at the Featherstone Road Bridge and extends 780 feet upstream of that point. It is just a few hundred feet below the plant's discharge. This 1993 survey yielded substantially greater numbers of fish, with 21 trout being found, at lengths ranging from 8.8 to 16.5 inches, and weights ranging up to 1.67 pounds. These were all brown trout. In addition, there was one yearling fingerling brown trout. Based upon sampling efficiencies of .65 for adult trout, and .25 for fingerling trout, the Department estimates that that station contains 219 adult trout per mile, and 27 fingerling trout per mile. Attachment 51. Unfortunately, the record does not contain any electroshocking survey results from August of 1993 at upland reaches, so that it is impossible to know whether the same ratios of lowland population to upland population occurred in 1993 as occurred in 1989. The '89 data, however, comports with testimony in the record which suggests that the trout population is much greater in the upland area than in the lowland area.

134. The creek below the plant's outfall, which is about 1.7 miles long, is marked by the marshy area between Highway 61 and the Mississippi River, and a developing commercial/industrial area upland of Highway 61. Aerial photographs show the stream to be bordered by the Clay City Industrial Park, Wilson Oil Company, a coal storage yard, the Goodhue County Shop Building, and the tannery. (1989 aerial photographs submitted by Red Wing/Foot, and Tr. 9, at p. 44). The only evidence of fishing or recreational use of the 1.7 mile stretch is one mention, in the DNR reclassification documentation, that "Anglers have reported catching trout near Highway 61 and near the mouth of the Mississippi."

135. The Administrative Law Judge concludes that the Agency has failed to adequately consider the cost (and, therefore, the feasibility and practicability) of the proposed reclassification of the lower reach of Hay Creek at Red Wing. The reasonableness of the proposed reclassification is marginal at best in light of the short distance and the character of the adjoining lands when compared to the cost to upgrade the facility. But the uncertainty of the nitrification costs, coupled with the inability of either a well-qualified expert or the Agency to put any cost on the temperature requirement, leads to the conclusion that the proposed reclassification cannot be deemed to be "reasonable, feasible, and practical" within the meaning of Minn. Stat. 116.07, subd. 6 (1992).

136. The above Finding prohibits the Agency from reclassifying the 1.7 mile reach below the outfall of the treatment plant at this time. The determination does not affect the proposed reclassification of the 1.9 mile reach above the outfall. Therefore, the Agency would be free to reclassify the portion above the outfall if it desired to. The 1989 and 1993 electroshocking data would provide a rational basis to support such a reclassification.

Fond du Lac Nation and Grand Portage Band

137. Both orally (Tr. 5, pp. 41-56) and in writing, the Agency was urged to make a number of changes to the rules to reflect the role of wild rice in the cultural and economic lives of Indian peoples, as well as wild rice's value to waterfowl. The Agency was urged to develop water quality standards to enhance and maintain wild rice waters and habitat.

138. The Agency responded that all known wild rice waters were currently classified as Class 4A waters (a classification designed to permit waters to be used for agriculture). The Agency noted that there was a particular limitation (10 milligrams per liter of sulphates) applicable to water used for the production of wild rice during periods when the rice may be susceptible to damage by high sulphate levels. The Agency indicated that it would be amenable to any additional limitations which would enhance the production of wild rice but that the chemical and environmental factors which protect and promote the growth of wild rice are not well understood at the current time.

139. The Administrative Law Judge finds that the Agency has demonstrated the need for and reasonableness of its proposed classification system for wild rice waters, including Class 4A waters with the special sulphate limitation.

140. It was also proposed that the few remaining quality wild rice waters of the State be designated as ORVWs. The Agency responded that it was unsure of what criteria to use to identify a "quality wild rice water", and that it would be necessary to identify criteria and then follow the rulemaking process in another proceeding before it could make such a change. The Administrative Law Judge finds that the Agency has justified this position, but as has been done in the case of calcarious fens and other unique waters, he would suggest that the commentator work with the Department of Natural Resources and the Agency to determine whether or not criteria could be developed, and the waters properly identified, so that they could be listed in a future rulemaking proceeding.

141. It was also suggested that the Agency develop new standards which would prohibit the removal of riparian vegetation around cold water streams, protect fisheries and shore birds in the St. Louis River from impacts of a hydropower dam, and protect cold water streams from pollution by livestock which are allowed to tramp through and enrich streams. In each case, the Agency responded that it could not react to the proposals during this rulemaking proceeding. The Administrative Law Judge agrees with that assertion, and finds the rules to be needed and reasonable without the proposed additions.

142. The Grand Portage Band also noted that the Agency was proposing to specifically list and classify four water bodies which were located within the Grand Portage Reservation. The four bodies were Grand Portage Creek, Hollow Rock Creek, Red Rock Creek, and Reservation River. The Band also asked that any other waters of the Reservation which were listed in the rules be

removed from the rules. The Grand Portage Reservation Tribal Council asserted that it, rather than the State, had authority to regulate those waters because it had inherent authority to regulate activities and natural resources within the boundaries of the reservation. The Tribal Council did not, however, supply any legal authority for its position.

143. The Agency responded, in its Final Comments at pp. 77-82, with a legal argument that basically asserts that listing and classifying the four bodies of water are properly within the scope of the rule, but that questions of who has jurisdiction to regulate persons whose activities may affect these bodies of water need not and cannot be determined in this rulemaking proceeding. The Agency asserted that the issue of who has authority to regulate activities on reservations depends on many variables, and must be determined on a case-by-case basis.

144. The Administrative Law Judge concludes that the Agency has demonstrated its statutory authority to list and classify the four water bodies (and by implication, any other water bodies already listed and classified in the existing rules), even though they are located either partially or wholly within the boundaries of an Indian reservation.3

145. Both the Grand Portage Band and the Fond du Lac Nation urged the Agency to support regulations proposed by the EPA entitled, "Water Quality Guidance for the Great Lakes System", as published in the Federal Register on April 16, 1993. This guidance, commonly known as the Great Lakes Initiative, deals with issues such as mercury, PCBs and dioxin. The Agency responded that it has been involved in the development of the proposal, and has submitted substantial comments on the proposal following its publication. The Agency indicated it intended to continue to work with the EPA on the proposal. The Administrative Law Judge finds that no change to the rules is required as the result of this suggestion.

3This conclusion is limited to the narrowest of issues -- whether the Agency has statutory authority to list and classify waters which are located either partially, or wholly, within the boundaries of a reservation. It should not be misinterpreted as expressing any opinion on enforcement powers, priority of rights, or any other matters which might arise in some other setting. Miscellaneous Issue: Biological Criteria

146. Identical letters submitted by Minnesota Timber Producers Association and Minnesota Forest Industries, Inc. raised a question about language in proposed Rule 7050.0150. The particular language at issue reads as follows:

> The intent of the State is to protect and maintain surface waters in a condition which allows for the maintenance of all existing beneficial uses. The condition of a surface water body is determined by its physical, chemical, and

biological qualities.

> The biological quality of any given surface water body shall be assessed by comparison to the biological integrity of a reference condition or conditions which best represents the most natural condition for that surface water body type within a geographic region. The biological quality shall be determined by reliable measures of indicative communities of fauna and flora.

With regard to the last sentence in the proposed rule, the commentators asked whether the "reliable measures" would be taken at one point in time, or throughout time. They indicated that biological quality and conditions do change over time due to succession, the life cycle of the community and other factors. They urged that the Agency recognize the need to take such measurements over time.

147. The Agency responded (Post-Hearing Response, at p. 80) that it recognized the need to update biological reference conditions over time to reflect natural successional changes that occur over several years, as well as seasonal changes which might require adjustment of data from one season to another.

148. Northern States Power Company raised a related issue, asking whether or not human activities, such as agriculture, industrial consumption, navigation and fishery use would be considered when establishing reference conditions for biological quality. The Agency responded (Final Comments, at p. 104-05) that it recognized that water bodies were subject to a number of different kinds of human activities. The Agency distinguished, however, between direct impacts from human activities (such as point source discharges at a specific location) and more ubiquitous human impacts, such as atmospheric deposition which affects most waters throughout the state. The Agency did not think it was appropriate to include the first kind of impact, but recognized it would be difficult to avoid including the second. The Agency explained that "reference conditions which best represent the most natural condition" was intended to refer to minimally impacted or least impacted sites, rather than pristine ones.

149. Ashland Petroleum Company went beyond those inquiries to attack the lack of specificity in the proposed rule. Ashland indicated that the proposed rule does not adequately address how biological quality will be measured, for what purposes the measurement will be used, what will constitute acceptable biological quality, and what actions will be taken to address degraded biological quality. Ashland also expressed concern about the costs associated with conducting biological assessments, suggesting that the Agency will be unable to conduct them itself, and will shift the cost of performing assessments unto the regulated community. Finally, Ashland questioned the need for the rule at all.

150. The Agency responded to these questions and issues at some length in its Final Comments (pp. 104-114). The

Administrative Law Judge concludes that the Agency has demonstrated the need for and reasonableness of its proposed rule. The long and short of the matter is that the Agency does not have a choice about adoption. The EPA is requiring the adoption of narrative biological criteria at this time. As in the case of wetlands discussed at the start of this Report, the EPA can and does dictate the agenda which the states must follow.

Miscellaneous Issues: Reclassification of Minnesota and Mississippi
Rivers

151. A number of commentators suggested that the Agency upgrade various portions of the Mississippi River or the Minnesota River. The Department of Natural Resources (both rivers), the Isaac Walton League (Mississippi), the Sierra Club (both rivers). The Agency responded that such reclassifications, without prior notice, would be a substantial change to the rule as initially proposed, but that the staff would discuss these issues with interested parties before the next triennual review begins. Final Comments, p. 118. The Administrative Law Judge believes this to be a reasonable position, and the Agency's proposed rule may be adopted without such changes. A similar comment was made by the United States Fish & Wildlife Service with regard to refuges and certain other classes of sites. The Administrative Law Judge agrees with the Agency that it would be inappropriate to attempt to make such reclassifications at this point in this rulemaking proceeding.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Agency gave proper notice of the hearing in this matter.

2. That the Agency has fulfilled the procedural requirements of Minn. Stat. 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.

3. That the Agency has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Finding 135.

4. That the Agency has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. 14.14, subd. 2 and 14.50 (iii).

5. That the amendments and additions to the proposed rules which were suggested by the Agency after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. 14.15,

subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusion 3 as noted at Finding 135.

7. That due to Conclusion 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. 14.15, subd. 3.

8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Agency from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above.

Dated this day of November, 1993.

ALLAN W. KLEIN
Administrative Law Judge